BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 12 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 671

V. B. KINNEY, Secretary of Labor of the State of Nebraska,

Petitioner,

vs.

STATE OF NEBRASKA; *Ex Rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER, and DAVIS SCHOOL SERVICE.

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

WALTER GORDON MERRITT,
Attorney for Respondents.

APPELLATE LAW PRINTERS, INC., 161 Lafayette Street, N. Y.
160

BLANK PAGE

SUBJECT INDEX

	PAGE
I. Statement	1
II. Question Involved	1
III. Argument.	
This Court should not be called upon to overrule a decision of the importance of *Ribnik* v. *McBride* on a record as deficient as to facts as the one herein	2
IV. Conclusion	5

TABLE OF CASES CITED

Dry Dock Co. v. Schauffler, 303 U. S. 54, 82 Law Ed. 646	4
Nebbia v. New York, 291 U. S. 502, 78 Law Ed. 940	2–3
O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 75 Law Ed. 324	3
Ribnik v. McBride, 277 U. S. 350, 72 Law Ed. 913	1, 2, 3, 4
West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 Law Ed. 703	3

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940

V. B. KINNEY, Secretary of Labor of the State of Nebraska,
Petitioner,
vs.
STATE OF NEBRASKA, *Ex Rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER, and DAVIS SCHOOL SERVICE.

No. 671

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

I

Statement

Substantially all of the facts disclosed by the record on this petition are fully set forth in one and one-half pages of petitioner's application (pp. 2 to 3, inclusive).

II

Question Involved.

Petitioner is asking this Court to grant a writ of certiorari in this case in order that it may determine whether or not it should overrule its decision in *Ribnik* v. *McBride*, 277 U. S. 350, 72 Law. Ed. 913, to the effect that state

legislation fixing the maximum charges of employment agencies is a violation of Section 1 of the 14th Amendment to the Constitution of the United States (Petitioner's Brief, p. 10).

III

ARGUMENT

This Court should not be called upon to overrule a decision of the importance of *Ribnik* v. *McBride* on a record as deficient as to facts as the one herein.

Because of the deficiency in this record of any facts as to the business of private employment agencies in the State of Nebraska, this Court is called upon to grant a writ of certiorari so that it might determine whether or not it should reverse its ruling in *Ribnik* v. *McBride, supra*, and hold that private employment agencies *per se* constitute a business so "affected with a public interest" that a state statute fixing their charges does not violate Section 1 of the 14th Amendment to the Constitution of the United States.

Counsel for respondents can find no decision of this Court to the effect that all businesses are subject to legislative price-fixing. It is submitted that *Nebbia* v. *New York*, 291 U. S. 502, 78 Law Ed. 940 relied upon in petitioner's brief as in effect overruling *Ribnik* v. *McBride*, does not discard the criterion of public interest or public welfare in determining the validity of price-fixing legislation, but reaffirms this criterion. From the language of Justice Roberts' opinion in the *Nebbia* case, we take the following (pp. 536-7):

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth

> and Fourteenth Amendments is to determine *in each case whether circumstances* vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry *for adequate reasons* is subject to control for the public good. * * *
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may *reasonably* be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. * * *." (Italics ours.)

In *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 81 Law Ed. 703, also relied upon in petitioner's brief (p. 13) Chief Justice HUGHES, speaking for the Court, said (p. 391):

> "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."

It would seem, therefore, that whether or not the business of all private employment agencies in the State of Nebraska had, since the decision in *Ribnik* v. *McBride,* become "affected with a public interest" so as to justify this Court in overruling its decision in that case, is a question of law to be determined by this Court on the basis of facts.

While it is conceded that anyone ordinarily attacking the constitutionality of an act must bear the burden of proof of showing that under all the circumstances the act is beyond legislative power (*O'Gorman & Young* v. *Hartford Fire Insurance Company,* 282 U. S. 251, 75 Law Ed. 324), we submit that where this Court has already found in general terms that legislative price fixing for employment agencies is not a valid exercise of power, the burden

of proof to reverse this conclusion by reason of changed circumstances or otherwise rests upon the party seeking such a reversal.

The record on this petition is wholly barren of any attempt by the petitioner to meet that burden. The amended answer alleges (paragraph IV) that "The business of a private employment agency is vitally affected with a public interest" but, as stated in the majority opinion in the Nebraska Supreme Court in this case, this is a conclusion of law.

Drydock Co. v. *Schauffler,* 303 U. S. 54, 82 Law Ed. 646.

What, then, are the missing facts which, from the respondents' viewpoint, this Court should have before it in order to give intelligent consideration to the question as to whether *Ribnik* v. *McBride* should be reversed? The respondents suggest some of these:

The practicability or impracticability of fixing rigid standards of remuneration for services of varying value relating to the procurement of employment for day laborers, skilled help, white-collar groups and executives, most of which are involved in this case.

The mischiefs or evils, if any, which have grown out of the administration of employment agencies, which price-fixing is calculated to cure. In this connection consideration should be given to the existence of federal, state, charitable and labor-union agencies, established in part under authority of Congress. To what extent does the competition of these free employment agencies, which have greatly expanded since the decision in *Ribnik* v. *McBride,* eliminate and make non-existent the evil upon the existence of which the validity of legislative price fixing must depend? Since this is a state statute, there should likewise be evidence as to the operations of paid and free agencies in the State of Nebraska, with due regard to the needs of the community.

Without some such facts before it we submit that this Court cannot properly determine whether or not price-fixing regulation for this service industry in Nebraska is arbitrary or has some reasonable relation to the problem with which that state was confronted.

IV

CONCLUSION

For the reasons stated we submit that this application for a writ of certiorari should be denied.

Dated: February, 1941.

Respectfully submitted,

WALTER GORDON MERRITT,
Attorney for Respondents.